FILED
MAR - 6 2015
CLERK

Nos. 14-556, 14-562, 14-571 and 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

VALERIA TANCO, ET AL., PETITIONERS

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.

APRIL DEBOER, ET AL., PETITIONERS

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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Cases:

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Baker v. *Nelson*:
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Baskin v. *Bogan*, 766 F.3d 648 (7th Cir.), cert. denied, 135 S. Ct. 316 (2014) 17, 19, 20, 28
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Bottoms v. *Bottoms*, 457 S.E.2d 102 (Va. 1995) 5
Bowen v. *Bowen*, 688 So. 2d 1374 (Miss. 1997) 5
Bowen v. *Gilliard*, 483 U.S. 587 (1987) 16, 17, 19, 20
Bowers v. *Hardwick*, 478 U.S. 186 (1986) 30
Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 16

Cases—Continued: Page

Christian Legal Soc'y v. *Martinez*, 561 U.S. 661 (2010) 16
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) ..... *passim*
City of Eastlake v. *Forest City Enters.*, 426 U.S. 668 (1976) 30
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 15
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Edelman v. *Jordan*, 415 U.S. 651 (1974) 21
Fiallo v. *Bell*, 430 U.S. 787 (1977) 22
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 16, 18, 20
Goldman v. *Weinberger*, 475 U.S. 503 (1986) 22
Goodridge v. *Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) 7
Graham v. *Richardson*, 403 U.S. 365 (1971) 19
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 14
H.H., Ex parte, 830 So. 2d 21 (Ala. 2002) 5
Heller v. *Doe*, 509 U.S. 312 (1993) 30
J.E.B. v. *Alabama T.B.*, 511 U.S. 127 (1994) 30
Johnson v. *California*, 543 U.S. 499 (2005) 22
Kitchen v. *Herbert*, 755 F.3d 1193 (10th Cir.), cert. denied, 135 S. Ct. 26 (2014) 23, 27
Lawrence v. *Texas*, 539 U.S. 558 (2003) ..... *passim*
Lesbian/Gay Freedom Day Comm., Inc. v. *INS*, 541 F. Supp. 569 (N.D. Cal. 1982) 4
Loving v. *Virginia*, 388 U.S. 1 (1967) ..... *passim*
Lyng v. *Castillo*, 477 U.S. 635 (1986) 19, 20
Massachusetts Bd. of Ret. v. *Murgia*, 427 U.S. 307 (1976) 24
Mathews v. *Lucas*, 427 U.S. 495 (1976) 18, 19

Cases—Continued: Page

Romer v. *Evans*, 517 U.S. 620 (1996) 16, 31, 35
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 24
S.J.L.S. v. *T.L.S.*, 265 S.W.3d 804 (Ky. Ct. App. 2008) 8
Turner v. *Safley*, 482 U.S. 78 (1987) 25
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Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) 31
Watson v. *City of Memphis*, 373 U.S. 526 (1963) 28
Windsor v. *United States*, 699 F.3d 169 (2d Cir. 2012) 21
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 23

Constitutions and statutes:

U.S. Const.:
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Ky. Const. § 233A 7
Mich. Const. Art. I, § 25 7
Ohio Const. Art. XV, § 11 7
Tenn. Const. Art. XI, § 18 7
Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875 5
Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419:
28 U.S.C. 1738C (§ 2) 32
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Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 5

Statutes—Continued: Page

Ala. Code (LexisNexis):
§ 13A-6-60 (2005) 4
§ 13A-6-65(a)(3) (2014) 4
Ga. Code Ann. § 16-6-2(a)(1) (2011) 4
2006 Ga. Laws 386 4
Kan. Stat. Ann. § 21-5504(a)(1) (Supp. 2013) 4
Ky. Rev. Stat. (LexisNexis):
(2010):
§ 141.069(2) 8
§ 402.005 7
§ 402.020(1)(d) 7
§ 402.040(2) 7
§ 420.045 7
§ 199.470 (2013) 7
La. Rev. Stat. Ann. § 14:89(A)(1) (Supp. 2014) 4
Mich. Comp. Laws Ann. (West):
§ 551.1 (2005) 7
§ 600.2922(a) (2010) 8
§ 710.24 (Supp. 2014) 7
Ohio Rev. Code Ann. (LexisNexis):
(2008):
§ 3101.01(C) 7
§ 3107.03 8
§ 2105.06 (2011) 8
Tenn. Code Ann. (2014):
§ 36-1-115 8
§ 36-3-113(a) 7
§ 50-6-210(e)(1) 8
Tenn. House Bill No. 600, Pub. Ch. 278 (2011), http://www.state.tn.us/sos/acts/107/pub/pc0278.pdf 20

Statutes—Continued: Page

Tex. Penal Code Ann. (West 2011):
§ 21.01(1)(A) 4
§ 21.06 4
Utah Code Ann. § 76-5-403(1) (LexisNexis Supp. 2014) 4

Miscellaneous:

Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents* (Feb. 2002), http://www.pediatrics.aappublications.org/content/109/2/339.full.pdf+html 28
Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (1973), 131 Am. J. Psychiatry 497 (1974) 18
Am. Psychological Ass'n, *Marriage Equality and LGBT Health*, http://www.apa.org/about/gr/issues/lgbt/marriage-equality.pdf (last visited Mar. 5, 2015) 28
Dale Carpenter, Windsor *Products*, 2013 Sup. Ct. Rev. 183 (2013) 4
Simon R. Crouch et al., *Parent-Reported Measures of Child Health and Wellbeing in Same-Sex Parent Families*, 14 BMC Public Health 635 (June 21, 2014) 28
Andrew DeMillo, *Arkansas bars expanding local protections for gays, lesbians*, Associated Press (Feb. 23, 2015), http://www.apnews.com/ap/db_268748/contentdetail.htm?contentguid=aAo9UJmZ 20
FBI:
Hate Crime Statistics 1996, http://www.fbi.gov/ about-us/cjis/ucr/hate-crime/1996/hatecrime96.pdf 6

Miscellaneous—Continued: Page

2013 Hate Crime Statistics, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/tables/1tabledatadecpdf/table_1_incidents_offenses_victims_and_known_offenders_by_bias_motivation_2013.xls 6

Sean Gregory, *Louisiana Sodomy Sting: How Invalidated Sex Laws Still Lead to Arrests*, Time (July 31, 2013), http://www.nation.time.com/2013/07/31/louisiana-sodomy-sting-how-invalidated-sex-laws-still-lead-to-arrests/.....4

H.R. Rep. No. 664, 104th Cong., 2d Sess. (1996).....32

Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011).....2

Michael Klarman, *From the Closet to the Altar* (2012).....20

Official Journal of the House of Representatives of the State of Louisiana (Apr. 15, 2014), http://house.louisiana.gov/H_Journals/H_Journals_All/2014_RSJournals/14RS%20%20HJ%200415%2022.pdf.....4

Pew Research Ctr., *How many same-sex marriages in the U.S.? At least 71,165, probably more* (June 26, 2013), http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more 29

Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010), http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a 18

Miscellaneous—Continued: Page

Trudy Ring, *Voters in Two Kansas Cities Repeal Antidiscrimination Laws*, Advocate (Nov. 8, 2012), http://www.advocate.com/politics/election/2012/11/08/voters-two-kansas-cities-repeal-antidiscrimination-laws 20

Carl Smith, *Wiseman: Aldermen offered no explanation for LGBT-related policy discussions in executive session*, The Dispatch (Jan. 7, 2015), http://www.cdispatch.com/news/article.asp?aid=39203 20

Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 Wis. L. Rev. 17 (2006) 29

A.G. Sulzberger, *Kansas Law on Sodomy Remains on Books Despite a Cull*, N.Y. Times, Jan. 21, 2012, at A13 4

Williams Inst.:

LGBT Parenting in the United States (Feb. 2013), http://www.williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf 27

Brad Sears et al., *Surveys of LGBT Public Employees and Their Co-Workers, in Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), http://www.williamsinstitute.law.ucla.edu/wp-content/uploads/9_Surveys.pdf. 6

U.S. Census Bureau, *American Community Survey Data on Same Sex Couples* (2013) http://www.census.gov/hhes/samesex/data/acs.html 29

U.S. Dep't of Justice, *Investigation of the New Orleans Police Department* (Mar. 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf 6

Robert Wintemute, *Sexual Orientation and Human Rights* (1995) 20

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INTEREST OF THE UNITED STATES

These cases concern the authority of a State to deny to same-sex couples and their children the protections and benefits granted through civil marriage to opposite-sex couples and their children. The United States has a strong interest in the eradication of discrimination on the basis of sexual orientation. The President and Attorney General have determined that classifications based on sexual orientation should be subject to heightened scrutiny. See Letter from Eric H. Holder, Jr., Attorney General of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011). The United States also has an interest because marital status is relevant to many benefits and responsibilities under federal law. See *United States* v. *Windsor*, 133 S. Ct. 2675, 2694-2695 (2013).

STATEMENT

Petitioners are same-sex couples who have been denied the privileges and responsibilities of civil marriage by the States in which they make their homes. Petitioners have formed, and seek legal recognition of, their committed relationships for the same reasons that opposite-sex couples do. But their home States persist in excluding them from the "dignity and status" of civil marriage and the "far-reaching legal acknowledgment of the intimate relationship between two people" that civil marriage represents, *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013). In doing so, those States have burdened petitioners in every aspect of life that marriage touches, "from the mundane to the profound," *id.* at 2694.

The pervasive discrimination petitioners face because they cannot marry is reflected in their pleas for equal treatment: "[s]ome involve a birth, others a death"; "[s]ome involve concerns about property, taxes, and insurance"; others involve "rights to visit a partner or partner's child in the hospital." 14-556 Pet. App. 16a (Pet. App.). These cases thus require the Court to decide whether States may deny to lesbian and gay couples—more than 700,000 families, including nearly 220,000 children—equal participation in an institution that gives legal expression and protection to "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

1. Throughout this Nation's history, lesbian and gay people have encountered numerous barriers—public and private, symbolic and concrete—that have prevented them from full, free, and equal participation in American life. The federal government, state and local governments, and private parties have all contributed to this history of discrimination. Many forms of discrimination continue to this day.

Criminal laws. Perhaps the starkest form of discrimination against lesbian and gay people is our Nation's long history of "demean[ing] their existence * * * by making their private sexual conduct a crime." *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003); see, *e.g.*, *id.* at 573. "When homosexual conduct is made criminal * * *, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575.

Although this Court held over a decade ago that such declarations are unconstitutional, *Lawrence*, 539 U.S. at

575, they remain on the books in many States. See, *e.g.*, Ala. Code §§ 13A-6-60, 13A-6-65(a)(3) (LexisNexis 2005); Ga. Code Ann. § 16-6-2(a)(1) (2011); Kan. Stat. Ann. § 21-5504(a)(1) (Supp. 2013); La. Rev. Stat. Ann. 14:89(A)(1) (Supp. 2014); Tex. Penal Code Ann. §§ 21.01(1)(A), 21.06 (West 2011); Utah Code Ann. § 76-5-403(1) (LexisNexis Supp. 2014). One State has affirmatively reenacted such a law post-*Lawrence*, 2006 Ga. Laws 386, and other States have deliberately chosen not to repeal preexisting laws, see A.G. Sulzberger, *Kansas Law on Sodomy Remains on Books Despite a Cull*, N.Y. Times, Jan. 21, 2012, at A13; *Official Journal of the House of Representatives of the State of Louisiana* 741 (Apr. 15, 2014), http://www.house.louisiana.gov/H_Journals/H_Journals_All/2014_RSJournals/14RS%20-%20HJ%200415%2022.pdf. Some local officials still attempt to bring criminal charges under these laws. See Sean Gregory, *Louisiana Sodomy Sting: How Invalidated Sex Laws Still Lead to Arrests*, Time (July 31, 2013), http://www.nation.time.com/2013/07/31/louisiana-sodomy-sting-how-invalidated-sex-laws-still-lead-to-arrests/.

Official hostility. In the early twentieth century, the sexual orientation or conduct of lesbian and gay people could provide a basis for indefinite civil institutionalization, as well as sterilization or castration, on the ground that they were "moral degenerates" or "sexual perverts." Dale Carpenter, Windsor *Products*, 2013 Sup. Ct. Rev. 183, 253 (2013). As late as 1991, lesbian and gay aliens were categorically subject to exclusion from the United States on the ground that they were "persons of constitutional psychopathic inferiority," mentally "defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc.* v. *INS*, 541

F. Supp. 569, 571-572 (N.D. Cal. 1982) (quoting Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875); see Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

States and localities have denied child custody and visitation rights to lesbian and gay parents based on their intimate relationships. See, *e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring); *Bowen* v. *Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997); *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). Historically, public employees at both the federal and state levels were subject to intrusive investigations of their private lives and to termination if they were suspected of being lesbian or gay. See U.S. Br. at 23-24, *Windsor*, *supra* (No. 12-307) (U.S. *Windsor* Br.). The federal government was particularly aggressive in forcing thousands of federal employees out of their jobs based on suspicions about their sexual orientation, or in denying them opportunities, such as by deeming them ineligible for security clearances. And by banning lesbian and gay people from serving openly in the Armed Forces before 2011, the federal government treated their sexual orientation as incompatible with a significant attribute of citizenship: the chance to defend the Nation.

Lesbian and gay people have long been, and continue to be, targets of discriminatory law-enforcement practices. Historically, police would engage in harassment through selective enforcement of liquor-licensing laws and laws prohibiting lewdness, vagrancy, and disorderly conduct. See U.S. *Windsor* Br. at 25-26. And as recently as 2011, the Department of Justice found a pattern and practice of discriminatory policing against lesbian and gay people by the New Orleans Police Department. U.S. Dep't of Justice,

Investigation of the New Orleans Police Department 34-40 (Mar. 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf.

Hate crimes. Animus toward gay, lesbian, bisexual, or transgender people is the second-most common motivation for hate crimes. See Federal Bureau of Investigation (FBI), *2013 Hate Crime Statistics* tbl.1, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/tables/1tabledatadecpdf/table_1_incidents_offenses_victims_and_known_offenders_by_bias_motivation_2013.xls. Indeed, from 1996 (the first year for which the FBI reported data) to 2013 (the latest year in which the FBI reported data), such hate crimes increased by 21%, even as hate crimes overall decreased by 32%. Compare *ibid.*, with FBI, *Hate Crime Statistics 1996* tbl.1, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/1996/hatecrime96.pdf.

Employment discrimination. Employers and co-workers continue to discriminate against lesbian and gay people in the workplace. A set of 15 studies conducted since the mid-1990s has found that significant percentages of lesbian, gay, and bisexual people have experienced workplace discrimination, including being fired or refused employment; being denied promotion or given unfavorable performance reviews; being verbally or physically abused or experiencing workplace vandalism; and receiving unequal pay or benefits. Brad Sears et al., Williams Inst., *Surveys of LGBT Public Employees and Their Co-Workers*, in *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* 9-1 (2009), http://www.williamsinstitute.law.ucla.edu/wp-content/uploads/9_Surveys.pdf.

2. These cases present challenges involving 16 lesbian and gay couples residing in Kentucky, Michigan,

Ohio, and Tennessee to laws in those States that bar them from the institution of civil marriage, and the dignity, rights, and responsibilities that marriage entails. Pet. App. 16a-22a; see Ky. Const. § 233A; Ky. Rev. Stat. Ann. §§ 402.005, 402.020(1)(d), 402.040(2) and 420.045 (LexisNexis 2010) (Ky. Stat.); Mich. Const. Art. I, § 25; Mich. Comp. Laws Ann. § 551.1 (West 2005) (Mich. Laws); Ohio Const. Art. XV, § 11; Ohio Rev. Code Ann. § 3101.01(C) (LexisNexis 2008) (Ohio Code); Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-113(a) (2014) (Tenn. Code). After the highest court in Massachusetts recognized a right under the Massachusetts constitution for same-sex couples to marry, see *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941 (2003), the voters in each of those four States amended their own state constitutions to foreclose marriage for lesbian or gay couples, even if the rights guaranteed under those state constitutions would otherwise have required it. Pet. App. 16a-22a.

Some petitioners seek recognition in their home States for their otherwise-lawful out-of-state marriages; others are currently unmarried and seek marriage licenses. Pet. App. 16a-22a. The refusal of their home States to recognize current or prospective marriages has prevented petitioners from realizing the wide range of tangible and intangible benefits that marriage provides. Among other things, the state marriage bans inhibit their ability to raise children in a recognized two-parent family. 14-571 Pet. App. 72a-75a. The adoption law in each State expressly provides for joint adoption by two parents only when the parents are married (see Ky. Stat. § 199.470 (LexisNexis 2013); Mich. Laws § 710.24 (West Supp.

2014); Ohio Code § 3107.03; Tenn. Code § 36-1-115), and none of the four States expressly permits separate adoptions of the same child by two parents who are not legally married under state law. Kentucky and Ohio have rejected adoption petitions filed by lesbian women seeking to become the second parent of a partner's biological child. See *S.J.L.S.* v. *T.L.S.*, 265 S.W.3d 804, 828 (Ky. Ct. App. 2008); *In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998).

The state marriage bans also deny lesbian and gay couples many other advantages under state law, in a wide range of areas, that opposite-sex couples may take for granted. Marriage affects contexts including taxation, see, *e.g.*, Ky. Stat. § 141.069(2) (tax deduction for spouse's educational expenses); intestate succession, see, *e.g.*, Ohio Code § 2105.06 (LexisNexis 2011) (inheritance rights of surviving spouse); workers' compensation, see, *e.g.*, Tenn. Code § 50-6-210(e)(1) (income benefits for dependent spouse); and wrongful-death actions, see, *e.g.*, Mich. Laws § 600.2922(3)(a) (West 2010) (automatic right for deceased's spouse to sue). And petitioners' cases illustrate some of the myriad other ways in which same-sex couples who would marry in-state if allowed, or whose out-of-state marriages are discounted, are disadvantaged. Kentucky residents Timothy Love and Lawrence Ysunza, who have lived together for over three decades, allege that Love's emergency heart surgery had to be delayed in order for him to execute documents granting Ysunza hospital access and medical-decisionmaking authority—rights that a spouse would have automatically. 14-574 Pet. App. 100a. Tennessee residents Valeria Tanco and Sophia Jesty cannot combine their healthcare plans and lack automatic visitation and

medical-decision rights. 14-562 Pet. App. 113a-114a. And Ohio-resident petitioners, although lawfully married under the laws of other States, cannot obtain from Ohio a child's birth certificate listing both spouses or a death certificate listing the surviving spouse. Pet. App. 20a-21a.

Beyond these tangible legal harms, petitioners also allege that the marriage bans inflict psychological and dignitary harms on themselves and their children. For example, Sergeant First Class Ijpe DeKoe, who married Thomas Kostura in New York and is now stationed in Tennessee, has explained that "as someone who has dedicated my career and risked my life to protect American values of freedom, liberty, and equality, it is particularly painful to return home after serving in Afghanistan only to have my citizenship diminished by Tennessee's refusal to recognize our marriage." 14-562 Pet. App. 114a-115a (brackets omitted). And Tanco and Jesty "are concerned about the environment in which their child will be raised, fearing that Tennessee's refusal to recognize her parents' marriage will stigmatize her, cause her to believe that she and her family are entitled to less dignity than her peers and their families, and give her the impression that her parents' love and their family unit is somehow less stable." *Id.* at 114a.

3. The district courts hearing petitioners' suits all held that the state marriage bans violate the federal Constitution's Fourteenth Amendment. Pet. App. 107a-221a; 14-562 Pet. App. 104a-130a; 14-571 Pet. App. 103a-141a; 14-574 Pet. App. 96a-157a. The court of appeals reversed. Pet. App. 1a-106a.

The court of appeals believed that, as a lower court, it was bound by *Baker* v. *Nelson*, 409 U.S. 810 (1972),

in which this Court summarily dismissed a challenge to Minnesota's denial of a marriage license to a same-sex couple. Pet. App. 23a-27a. The court of appeals also held that the marriage bans are constitutional because (in its view) they are rationally related to a state interest in "creat[ing] an incentive for two people who procreate together to stay together for purposes of rearing offspring" and a state interest in taking a "wait and see" approach before changing existing legal and social norms. *Id.* at 35a-37a. In reaching that holding, the court rejected the contention that the marriage bans warrant heightened scrutiny under the Fourteenth Amendment. *Id.* at 51a-58a. The court acknowledged "the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens." *Id.* at 52a. But it concluded that the "usual leap from history of discrimination to intensification of judicial review does not work" because "the institution of marriage arose independently of this record of discrimination." *Id.* at 53a.

Judge Daughtrey dissented. Pet. App. 70a-106a. She emphasized the "destabilizing effect" of the marriage bans on "tens of thousands of same-sex parents throughout the four states of the Sixth Circuit." *Id.* at 72a. Drawing upon trial evidence introduced in the Michigan case, she noted that "same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adopted child and twice as likely to be fostering a child"; that "the psychological well-being, educational development, and peer relationships were the same in children raised in gay, lesbian, or heterosexual homes"; and

that "heterosexual marriages have not suffered or decreased in number as a result of states permitting same-sex marriages." *Id.* at 78a-80a.

SUMMARY OF ARGUMENT

The marriage bans challenged in these cases impermissibly exclude lesbian and gay couples from the rights, responsibilities, and status of civil marriage. These facially discriminatory laws impose concrete harms on same-sex couples and send the inescapable message that same-sex couples and their children are second-class families, unworthy of the recognition and benefits that opposite-sex couples take for granted. The bans cannot be reconciled with the fundamental constitutional guarantee of "equal protection of the laws," U.S. Const. Amend. XIV.

A. This Court has appropriately recognized only a small set of legal classifications as constitutionally suspect and subject to heightened equal-protection scrutiny. Classification on the basis of sexual orientation presents the rare circumstance of a classification that should be added to that list.

Sexual orientation satisfies all four factors that this Court has looked to in determining whether to recognize a suspect class. First, lesbian and gay people have been subject to significant and continuing discrimination in this country. That history includes criminalization of intimate relations, treatment as deviants, denial of rights to care for children, targeting in hate crimes, and limitation of employment opportunities. See pp. 3-6, *supra*. Second, sexual orientation bears no relation to ability to participate in and contribute to society. Lesbian and gay people make critical contributions in every significant area of this Nation's life. Third, discrimination against lesbian

and gay people is based on an immutable or distinguishing characteristic. Sexual orientation is a core aspect of a person's identity, and it defines lesbian and gay people as a class. Fourth, lesbian and gay people are a minority group with limited political power. Recent progress toward eradicating some of the harshest and most overt forms of discrimination has in significant respects been the result of judicial enforcement of the Constitution, and legislative gains have often generated political backlash.

Heightened scrutiny under the Equal Protection Clause is particularly appropriate in the context of legal barriers to marriage. A State should be required to present an especially strong justification for a law that excludes a long-disadvantaged class of persons from an institution of such paramount personal, societal, and practical importance.

B. The marriage bans at issue here cannot survive heightened scrutiny because they are not substantially related to an important governmental objective. Respondents' contention that the marriage bans encourage biological parents to jointly raise children ignores the many non-procreative aspects of marriage, assumes counterintuitively and without evidence that allowing same-sex couples to marry would discourage opposite-sex couples from staying together, and unjustifiably disfavors children raised by same-sex couples by denying those couples the same incentives to remain together. Respondents' contention that the marriage bans further a state interest in proceeding with caution before departing from the traditional understanding of marriage echoes similar arguments advanced, and properly rejected, in other contexts, such as integration of public facilities and interracial

marriage. And respondents' contention that the marriage bans return the issue of marriage to the democratic process simply begs the question whether those bans exceed the limits that the Equal Protection Clause imposes.

C. The Court's recent decision in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), reinforces the conclusion that the state marriage bans are unconstitutional. In *Windsor*, the Court held unconstitutional a federal statute that denied recognition to same-sex couples who were validly married under state law, notwithstanding attempts by the law's defenders to justify the statute on substantially the same rationales that respondents advance here. The primary distinctions between these cases and *Windsor*—that these cases involve state rather than federal law, and that petitioners seek not only recognition of existing marriages but also licensing of new ones—mean that the marriage bans here inflict even more legal and practical harm than the law at issue in *Windsor*. They impose a more direct stigma that is all the more painful because its source is the home State and not the federal government; they exclude lesbian and gay couples from the institution of civil marriage; and they deprive the children of those couples of equal recognition of their family structure. There is no adequate justification for such a discriminatory and injurious exercise of state power.

ARGUMENT

THE STATE MARRIAGE BANS VIOLATE THE EQUAL PROTECTION CLAUSE

Few, if any, legal institutions have the symbolic, social, and practical importance of civil marriage. Marriage is the gateway to a vast array of governmen-

tal benefits, which "touch[] many aspects of married and family life, from the mundane to the profound," including parental rights, access to healthcare, and inheritance and survivorship. *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013); see pp. 7-9, *supra*. But "marriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2692. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). And "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

Just as governmental recognition of a marriage confers "a dignity and status of immense import," *Windsor*, 133 S. Ct. at 2692, governmental exclusion from the institution of marriage can impose profound emotional and practical hardships on committed couples. Same-sex couples form deeply committed relationships, and they seek the recognition, support, stability, and benefits of the institution of marriage for the same reasons as opposite-sex couples. A State's refusal to confer such status under state law through issuance of marriage licenses, or to recognize marriages lawfully licensed and performed out-of-state, "demeans the couple, whose moral and sexual choices the Constitution protects," *id.* at 2694. It "humiliates tens of thousands of children now being raised by same-sex couples," by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," *ibid.* It crystallizes in an acutely

painful way the stigma that lesbian and gay adolescents experience as they come to understand that an essential attribute of their being marks them for second-class status. And it violates the Equal Protection Clause.

A. Classifications Based On Sexual Orientation Are Subject To Heightened Scrutiny

1. Legislation is generally presumed valid and sustained if the "classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). When "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-442. But when legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment," the Equal Protection Clause imposes a greater burden on the sovereign to justify the classification. *Id.* at 440-441.

Such classifications are subject to heightened scrutiny, under which the government must show, at a minimum, that the classification drawn is "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). Heightened scrutiny provides an enhanced measure of protection in circumstances where there is a greater danger that the legal classification results from impermissible prejudice or stereotypes. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*).

2. The marriage bans in these cases discriminate on the basis of sexual orientation by foreclosing a class of marriages into which only lesbian and gay people are likely to enter. See, *e.g.*, *Windsor*, 133 S. Ct. at 2694 (observing that burdens on marriage bear on freedom of "sexual choice[]"); *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 689 (2010) (observing that the Court's "decisions have declined to distinguish between status and conduct" of lesbian and gay people) (citing cases); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

This Court has yet to determine what level of equal-protection scrutiny is appropriate for review of laws that classify based on sexual orientation. Previous decisions have found such laws illegitimate without expressly deciding the level-of-scrutiny issue. See *Windsor*, 133 S. Ct. 2675 (federal statute denying recognition to marriages of same-sex couples); *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (state statute banning same-sex intimacy); *Romer* v. *Evans*, 517 U.S. 620 (1996) (state statute repealing and prohibiting legal protections for lesbian and gay people).

This Court has, however, identified four factors that guide a determination whether to apply heightened scrutiny to a classification that singles out a particular group: (1) whether the class in question has suffered a history of discrimination, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the characteristic prompting the discrimination "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-441 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); (3) whether the discrimination

against members of the class is based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602 (citation omitted); and (4) whether the class is "a minority or politically powerless," *ibid.* The first two considerations lie at the core of the inquiry; are common to every class this Court has deemed suspect; and, where they coexist, provide direct and powerful reasons to apply additional scrutiny to a discriminatory classification, because they point strongly to the conclusion that the classification is the product of prejudice and stereotyping. By contrast, although relevant, neither "immutability" nor political powerlessness is dispositive. See, *e.g.*, *Cleburne*, 473 U.S. at 443 n.10 (immutability); *id.* at 472 n.24 (Marshall, J., concurring in part and dissenting in part) (political powerlessness). All four factors are present in the case of sexual orientation.

History of discrimination. As the court of appeals recognized, it is impossible to "deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens." Pet. App. 52a; see, *e.g.*, *Baskin* v. *Bogan*, 766 F.3d 648, 658 (7th Cir.) ("[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world."), cert. denied, 135 S. Ct. 316 (2014). The history—which includes treating lesbian and gay people as criminals and deviants, unfit parents, targets for hate crimes, and undesirable employees—speaks for itself. See pp. 3-6, *supra*.

General irrelevance of classification. As with other suspect classifications such as gender, race, or

religion, sexual orientation "bears 'no relation to [an] individual's ability to participate in and contribute to society'" and is not "a characteristic that the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 441, 446 (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976)); see *Frontiero*, 411 U.S. at 686 (plurality opinion). Historically, discrimination against lesbian and gay people has had nothing to do with ability to contribute to society, but has instead rested on the discredited view that they are, for example, sexual deviants, mentally ill, or immoral. See pp. 3-6, *supra*.

The American Psychiatric Association concluded more than 40 years ago that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (1973), 131 Am. J. Psychiatry 497 (1974). That fact is evident throughout all aspects of society, including military service. "[V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed," and lesbian and gay Americans have served with honor "to protect this nation and the ideals for which it stands." *Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010* (Dec. 22, 2010), http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a. Indeed, there are countless examples of contributions by lesbian and gay people in all fields—including business, medicine, technology, government, and the arts—even when they were forced to hide their sexual orientation due to anti-gay laws and attitudes. And the records in

these cases are replete with evidence of the contributions petitioners make to their communities, their States, and their Nation.

Discrete group. Sexual orientation is an "obvious, immutable, or distinguishing characteristic[] that define[s] * * * a discrete group," *Gilliard*, 483 U.S. at 602 (citation omitted); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986). The broad consensus in the scientific and medical community is that sexual orientation is not a choice for lesbian and gay people any more than it is for their straight neighbors. See U.S. *Windsor* Br. at 31-32 & nn.6-7. The choice lesbian and gay people face is whether to live their lives openly and honestly.

As this Court has recognized, sexual orientation is a core aspect of human identity, and its expression is an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 576-577. The distinctive orientation of lesbian and gay people—toward persons of their own sex—is what distinguishes them as a class from the majority of society. Such a defining characteristic may give rise to heightened scrutiny even if it is not always readily visible and even if it were subject to change. See *Lucas*, 427 U.S. at 506 ("[I]llegitimacy does not carry an obvious badge, as race or sex do."); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (alienage).

Limited political power. Finally, lesbian and gay people are "a minority or politically powerless," *Gilliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). It is undisputed that they are a small percentage of the population. See, *e.g.*, *Baskin*, 766 F.3d at 668. And while political powerlessness is not an inflexible prerequisite for recognition as a suspect class, see

Frontiero, 411 U.S. at 685-687 & n.17 (plurality opinion) (gender), the extensive and ongoing history of discrimination against lesbian and gay people illustrates their inability to protect themselves adequately through the political process.

Although some forms of discrimination have begun to diminish, many of the most critical strides toward equality for lesbian and gay people have resulted from judicial enforcement of constitutional guarantees, *e.g.*, *Lawrence*, *supra*, not from political action. Indeed, efforts to combat discrimination against lesbian and gay people have engendered significant political backlash, as evidenced by a series of successful state and local ballot initiatives, starting in the 1970s, that repealed antidiscrimination protections for lesbian and gay people. See, *e.g.*, Michael Klarman, *From the Closet to the Altar* 26-29 (2012); Robert Wintemute, *Sexual Orientation and Human Rights* 56 (1995).

That pattern continues today. In 2011, one State's legislature repealed local ordinances prohibiting discrimination on the basis of sexual orientation and barred future enactment of such ordinances. Tenn. House Bill No. 600, Pub. Ch. 278, http://www.state.tn.us/sos/acts/107/pub/pc0278.pdf. Another State has just adopted a similar provision. Andrew DeMillo, *Arkansas bars expanding local protections for gays, lesbians*, Associated Press (Feb. 23, 2015), http://www.apnews.com/ap/db_268748/contentdetail.htm?contentguid=aAo9UJmZ. Municipal anti-discrimination protections have likewise recently been repealed. See, *e.g.*, Carl Smith, *Wiseman: Aldermen offered no explanation for LGBT-related policy discussions in executive session*, The Dispatch (Jan. 7, 2015), http://www.cdispatch.com/news/article.asp?aid=39203; Trudy Ring, *Voters in Two Kansas Cities Repeal*

Antidiscrimination Laws, Advocate (Nov. 8, 2012), http://www.advocate.com/politics/election/2012/11/08/voters-two-kansas-cities-repeal-antidiscrimination-laws. And the history of marriage initiatives, such as those at issue in these cases, confirms that lesbian and gay people lack consistent "ability to attract the [favorable] attention of the lawmakers," *Cleburne*, 473 U.S. at 445.

3. The court of appeals did not question the history of discrimination against lesbian and gay people. Pet. App. 52a-53a. Nor did it question that lesbian and gay people are fully capable of contributing to society, engaging in meaningful marital commitment, and successfully raising children. *Id.* at 34a-35a, 53a. Its reasons for nevertheless rejecting heightened scrutiny are flawed.

First, whatever weight it might have had in the lower courts, this Court's summary disposition in *Baker* v. *Nelson*, 409 U.S. 810 (1972), has limited precedential value in this Court's plenary review of the questions presented. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Moreover, *Baker* predates many of the important developments in this Court's equal-protection jurisprudence, see *Windsor* v. *United States*, 699 F.3d 169, 178-179 (2d Cir. 2012), aff'd, 133 S. Ct. 2675 (2013), and neither the underlying state-court decision nor the questions presented in the plaintiffs' jurisdictional statement addressed the applicability of heightened scrutiny to classifications based on sexual orientation, see *Baker* v. *Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (en banc); J.S. 3, *Baker*, *supra* (No. 71-1027).

Second, the court of appeals erred in suggesting (Pet. App. 53a) that heightened scrutiny, even if generally appropriate for sexual-orientation classifica-

tions, would not apply to a law defining marriage as an institution unavailable to lesbian and gay couples, because that definition "arose independently" of sexual-orientation discrimination. Assuming *arguendo* the court's premise of independent development, the level of scrutiny afforded a particular classification does not—outside of certain specialized areas, see, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 792-793 (1977) (immigration); *Goldman* v. *Weinberger*, 475 U.S. 503, 507-508 (1986) (military)—vary based on the context in which the classification is employed. See, *e.g.*, *Johnson* v. *California*, 543 U.S. 499, 505 (2005) (noting that the Court "ha[s] insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Clark*, 486 U.S. at 461 (holding that intermediate scrutiny applies to "classifications based on sex or illegitimacy" without noting context-dependent exceptions).

If anything, the fact that these cases involve the institution of marriage underscores the appropriateness of heightened scrutiny. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving*, 388 U.S. at 12. And the Court has recognized that "personal decisions relating to marriage" are "central to the liberty protected by the Fourteenth Amendment." *Lawrence*, 539 U.S. at 587 (internal quotation marks and citation omitted). It should require a particularly strong justification to deny equal participation in an institution of such surpassing personal and social importance to a group that has been historically marginalized on the basis of characteristics that bear no general relevance to the ability of members of the group to contribute to society. See

Zablocki v. *Redhail*, 434 U.S. 374, 383 (1978) (stating, in equal-protection case, that "[s]ince our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required") (citation omitted).

That earlier generations may have failed to "even consider[] the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage," *Windsor*, 133 S. Ct. at 2689, does not counsel in favor of lesser scrutiny at a time when the invidiousness of sexual-orientation discrimination has become apparent. The Framers of the Fourteenth Amendment "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. That statement rings just as true in the context of laws limiting same-sex couples' access to marriage as it did when referring to laws prohibiting same-sex sexual intimacy. "[I]t is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen* v. *Herbert*, 755 F.3d 1193, 1218 (10th Cir.) (citation omitted), cert. denied, 135 S. Ct. 26 (2014).

Third, the court of appeals' perception (Pet. App. 56a-57a) that the political power of lesbian and gay people obviates the need for heightened scrutiny is both doctrinally and factually erroneous. As previously noted, see pp. 17, 19-20, *supra*, political powerlessness is not an irreducible prerequisite to heightened scrutiny. Sex-based classifications, for example, re-

ceive heightened scrutiny even though men and women as groups have considerable political power. See *VMI*, 518 U.S. at 531-534. And the court of appeals failed to engage with the manifest evidence that lesbian and gay people still suffer substantial discrimination in the political arena. See pp. 20-21, *supra*.

Finally, the court of appeals mistakenly viewed (Pet. App. 57a) the States' "undoubted power over marriage" as a reason for deferential review of the marriage bans. "State laws defining and regulating marriage," like other state laws, "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. In *Loving* v. *Virginia*, *supra*, this Court applied the "most rigid scrutiny" under the Equal Protection Clause to invalidate state laws banning interracial marriage. 388 U.S. at 11 (citation omitted). There is similarly no reason to water down the otherwise-appropriate level of scrutiny here.

4. This Court has appropriately been reluctant to recognize new suspect (or quasi-suspect) classes. See *Cleburne*, 473 U.S. at 441-442, 445-446. None of the Court's reasons for rejecting heightened scrutiny for other classifications, however, applies to sexual orientation. See, *e.g.*, *id.* at 442-443 (rejecting heightened scrutiny for persons with intellectual disabilities on grounds relating to, *inter alia*, "reduced ability to cope with and function in the everyday world"); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976) (rejecting heightened scrutiny for age classifications due to insufficient purposeful discrimination or unjustified stereotyping); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) (rejecting heightened review for poverty-based classifications because such a class would be too "large, diverse, and

amorphous"). Rather, sexual orientation falls squarely in the limited category of classifications for which heightened scrutiny is designed.

B. The State Marriage Bans Fail Heightened Scrutiny

Because a classification based on sexual orientation calls for the application of heightened scrutiny, respondents must establish, at a minimum, that their States' marriage bans are "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. The court of appeals did not suggest that any of the bans could survive such scrutiny. And they cannot. To the extent that any of the primary rationales advanced in defense of the bans were, as heightened scrutiny requires, the "actual state purposes" behind the laws, and "not hypothesized or invented *post hoc* in response to litigation," *VMI*, 518 U.S. at 533, 535, they cannot justify excluding lesbian and gay couples from the institution of marriage.

Responsible procreation and child-rearing. In respondents' view, marriage as an opposite-sex-only institution "create[s] an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 35a-36a. That argument rests on an unduly cramped view of marriage.

It should go without saying that marriage is much more than a government incentive program to encourage biological parents to stay together. At its most fundamental level, marriage constitutes an "expression[] of emotional support and public commitment," regardless of whether a married couple ever has children. *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987); see *Loving*, 388 U.S. at 12; see also *Lawrence*, 539 U.S. at 578 (recognizing the liberty interests of "married persons" in the privacy of their sexual conduct "even

when not intended to produce offspring") (citation omitted). Respondents' narrow conception of marriage would hardly be recognizable to most of its participants.

State laws reflect this broader understanding. Marriage opens the door to a wide range of state-conferred benefits that respect and give effect to the deep bonds between a married couple without regard to whether they are rearing biological offspring. Those benefits include intestacy rights, medical-decisionmaking authority, and state-incentivized financial support. See pp. 7-9, *supra*. And, as this Court recognized in *Windsor*, the federal government similarly looks to marital status for purposes as diverse as taxes, social security, healthcare benefits, and ethics rules. 133 S. Ct. at 2694-2695. The pervasive use of marriage for these purposes at the state and federal levels "stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits"; it "is a far-reaching legal acknowledgement of the intimate relationship between two people." *Id.* at 2692.

A complete bar to civil marriage for lesbian and gay couples is not remotely tailored to respondents' asserted procreational rationale. See *VMI*, 518 U.S. at 533 (law must be "substantially related" to the achievement of objective) (internal quotation marks and citation omitted). On that rationale, the marriage bans here are both overinclusive and underinclusive: opposite-sex couples that either do not want or are not able to procreate can marry, while same-sex couples who are raising children biologically related to one of the parents cannot.

The fact that opposite-sex couples can have unplanned children with one another, while same-sex couples cannot, Pet. App. 36a, provides no sound reason for barring same-sex couples from marriage. To begin with, respondents have provided no evidence for the counterintuitive proposition that recognizing same-sex marriages will change the incentives for opposite-sex couples to remain together to raise an unplanned child. See, *e.g.*, *Kitchen*, 755 F.3d at 1223 ("We emphatically agree with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."). At the same time, a State's legitimate interest in "creat[ing] an incentive for two people * * * to stay together for purposes of rearing offspring," Pet. App. 35a-36a, is not limited to "two people who procreate together," *ibid.* It instead embraces all couples raising children, whether those children came into their lives by accident or on purpose, and whether through giving birth or through adoption. The interest thus applies equally to same-sex couples raising a child as it does to opposite-sex couples raising a child. See Williams Inst., *LGBT Parenting in the United States* 1 (Feb. 2013), http://www.williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (estimating nearly 220,000 children in same-sex households nationwide); see, *e.g.*, 14-571 Pet. App. 72a-75a.

As the court of appeals recognized, "gay couples, no less than straight couples, are capable of raising children and providing stable families for them." Pet. App. 34a. "There is no scientific basis for the assertion that lesbian, gay, bisexual, and transgender per-

sons are not fit to marry or to become parents of healthy and well-adjusted children." Am. Psychological Ass'n, *Marriage Equality and LGBT Health* 1, http://www.apa.org/about/gr/issues/lgbt/marriage-equality.pdf; see, *e.g.*, Simon R. Crouch et al., *Parent-Reported Measures of Child Health and Wellbeing in Same-Sex Parent Families*, 14 BMC Public Health 635 (June 21, 2014); Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents* (Feb. 2002), http://www.pediatrics.aappublications.org/content/109/2/339.full.pdf+html. And "[i]f marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents." *Baskin*, 766 F.3d at 664.

Caution. Respondents also assert that the marriage bans serve a state interest in allowing them to "wait and see" what happens in other States that allow same-sex couples to marry before recognizing such marriages themselves. Pet. App. 36a. "The basic guarantees of our Constitution," however, "are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." *Watson* v. *City of Memphis*, 373 U.S. 526, 533 (1963); see *id.* at 528 (rejecting city's attempt to "justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts"). Defenders of the ban on interracial marriage at issue in *Loving* v. *Virginia*, *supra*, argued that "there ha[d] not been sufficient scientific investigation," Tr. of Oral Argument 31, *Loving*, *supra* (No. 395), of the "biological consequences" of interracial procreation, Resp. Br. App. E,

Loving, *supra* (No. 395). This Court did not credit that argument. Cf. 388 U.S. at 8. There is no reason to treat the wait-and-see argument in these cases any differently.

Even assuming caution for its own sake were a substantial state interest in some circumstances, the marriage bans here are not framed in temporary or provisional terms. See, *e.g.*, Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 Wis. L. Rev. 17, 23 (2006) (quoting campaign brochure explaining that Michigan initiative "settles the question once and for all what marriage is—for families today and future generations"). They contain neither a sunset provision nor a provision for further study. It is, in any event, unclear what waiting would accomplish. States first began allowing same-sex couples to marry in 2003. See *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003). Tens of thousands of same-sex couples have wed. See Pew Research Ctr., *How many same-sex marriages in the U.S.? At least 71,165, probably more* (June 26, 2013), http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more. Nothing that has happened during this period supports continuing to deny equal access to marriage to loving and committed same-sex couples. See, *e.g.*, Pet. App. 80a-81a (Daughtrey, J., dissenting); see also U.S. Census Bureau, *American Community Survey Data on Same Sex Couples* tbl.3 (2013), http://www.census.gov/hhes/samesex/data/acs.html (estimating more than 700,000 same-sex couples in the United States).

At bottom, the wait-and-see rationale largely reduces to an assertion that the persistence of class-

based discrimination is legally justifiable, at least in the short run, so long as it is premised on longstanding tradition. See Pet. App. 36a-37a. But tradition, no matter how long established, cannot in itself justify a law that otherwise violates the Equal Protection Clause. "Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.* v. *Alabama*, 511 U.S. 127, 143 n.15 (1994); see *VMI*, 518 U.S. at 535-536 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); *Lawrence*, 539 U.S. at 577-578 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis.").

Democratic self-governance. Respondents additionally claim that their marriage bans advance an interest in state self-governance. See, *e.g.*, Ohio C.A. Br. 46-47. The court of appeals, while frequently referencing this interest, *e.g.*, Pet. App. 16a, correctly declined to rely on it as a freestanding justification for the marriage bans, even under rational-basis review, *id.* at 32a-41a.

Promoting democratic decisionmaking is a laudable governmental interest. But it cannot itself justify a law that would otherwise violate the Constitution. "The sovereignty of the people is itself subject to * * * constitutional limitations." *City of Eastlake* v. *Forest City Enters.*, 426 U.S. 668, 676 (1976) (cita-

tion omitted). The very premise of heightened scrutiny is that certain types of classifications are "seldom relevant to the achievement of any legitimate state interest," and yet may become the basis for legislation that burdens persons who are unable adequately to protect themselves through the democratic process. *Cleburne*, 473 U.S. at 440. The judiciary plays a "special role in safeguarding" such classes. *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982).

Just as a State could not rely on an interest in democratic decisionmaking to prohibit marriage between individuals of a different race (cf. *Loving*, *supra*), it cannot rely on such an interest to prohibit marriage between individuals of the same sex. Respondents' reliance on the state interest in democratic self-governance thus ultimately begs the questions presented in these cases.

C. The Reasoning Of *United States* v. *Windsor* Confirms The Invalidity Of The State Marriage Bans

In *United States* v. *Windsor*, *supra*, this Court addressed a challenge to the federal government's refusal, codified in Section 3 of the federal Defense of Marriage Act (1 U.S.C. 7), to recognize marriages of same-sex couples considered valid under state law. 133 S. Ct. at 2682-2683. Reviewing that law with "careful consideration," the Court found it unconstitutional. *Id.* at 2692 (quoting *Romer*, 517 U.S. at 633); see *id.* at 2693, 2696. *Windsor*'s reasoning and result strongly support the conclusion that the bans at issue here are likewise unconstitutional.

A principal purpose of Section 3 was to "discourage enactment of state same-sex marriage laws." *Windsor*, 133 S. Ct. at 2693. The interests advanced in support of the marriage bans here—encouraging

opposite-sex parents to raise their children together, cautionary adherence to the traditional definition of marriage, and sovereign self-determination—were accordingly advanced to justify the discriminatory law at issue in *Windsor* as well. See Bipartisan Legal Advisory Grp. Br. at 28-49, *Windsor*, *supra* (No. 12-307). This Court nonetheless held Section 3 to be "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment," which "the equal protection guarantee of the Fourteenth Amendment" made "all the more specific and all the better understood and preserved." *Windsor*, 133 S. Ct. at 2695.* Respondents' arguments here should meet the same fate as their *Windsor* analogues.

The Court in *Windsor* reasoned that the affected same-sex couples had "their lives burdened * * *

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* The Court in *Windsor* did not address Section 2 of the Defense of Marriage Act, which provides that "[n]o State * * * shall be required to give effect to any public act, record, or judicial proceeding of any other State * * * respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. 1738C. Section 2 concerns the Full Faith and Credit Clause, which addresses the respect that one State must give the "Acts, Records and judicial Proceedings" of another. U.S. Const. Art. IV, § 1; see H.R. Rep. No. 664, 104th Cong., 2d Sess. 24-30 (1996). Any effect Section 2 might have in the context of a State's refusal to recognize an out-of-state marriage of a same-sex couple would most logically be considered only after answering the second question presented here, which asks whether such a refusal would be consistent with the Fourteenth Amendment. Should the Court agree with the government that such a refusal violates the Fourteenth Amendment, then Section 2 itself would never come into play. Should the Court hold otherwise, then the government would, in an appropriate case, evaluate the effect and constitutionality of Section 2 in light of the principles set forth in the Court's decision.

in visible and public ways" by Section 3's denial of marriage recognition. 133 S. Ct. at 2694. By barring application of a great number of statutes that turned on marriage, Section 3 not only "wr[ote] inequality into the entire United States Code," *ibid.*, but also brought "financial harm to children of same-sex couples" and divested such couples of "the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept," *id.* at 2695. On a more personal level, Section 3 "place[d] same-sex couples in an unstable position of being in a second-tier marriage," "demean[ed]" those couples, and "humiliate[d]" the tens of thousands of children being raised by such couples. *Id.* at 2694. Section 3 "instruct[ed] * * * all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696.

As in *Windsor*, the laws here "single[] out a class of persons," exclude them from a vital institution on the basis of this classification alone, and thereby "impose[] a disability on the class." 133 S. Ct. at 2695-2696. For same-sex couples who are already married, the States' refusals to recognize those valid marriages produce much the same harms here that the federal government's refusal produced in *Windsor*. But those harms are not limited to couples who are already married. The underlying dignitary and practical interests of same-sex couples, "whose moral and sexual choices the Constitution protects," *id.* at 2694 (citing *Lawrence*, 539 U.S. 558), and the underlying dignitary and practical interests of their families, do not meaningfully differ depending upon whether the couple is

already married in some other State or instead wishes to be married in the couple's home State.

Nor does it matter that, unlike *Windsor*, these cases involve regulation of marriage by the States, rather than by a federal law that "departs from th[e] history and tradition of reliance on state law to define marriage," 133 S. Ct. at 2692. Indeed, the injury to same-sex couples and their children is all the greater when it is the State, rather than the national government, that has declared marriage to be an opposite-sex-only institution. The couple is considerably more "demean[ed]" when it is barred from even "a second-tier marriage," recognized by the couple's home State but not by the federal government, *id.* at 2694, and instead relegated to no marriage at all. In that situation, the family is denied the many benefits provided at the state level, in addition to federal benefits that require recognition of a marriage by the state of residence. Cf. *id.* at 2694-2695. And the children's "humiliat[ion]" at their family's legal status, *id.* at 2694, is surely much greater when the source of the stigma is not the national government, but instead their own local community, cf. *id.* at 2693 (noting "the substantial societal impact the State's classifications have in the daily lives and customs of its people").

The harms of denying marriage to same-sex couples are sufficiently manifest that a law with that effect is unconstitutional, irrespective of whether it exhibits the sort of direct legislative record of animus that the Court in *Windsor* found in relation to Section 3. See 133 S. Ct. at 2693-2694. It is unnecessary to characterize those who voted for the laws at issue here as having acted out of conscious ill will in order to recognize the laws' inconsistency with the fundamen-

tal guarantee of equal protection. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). The marriage bans at issue here, like the law invalidated in *Romer* v. *Evans*, *supra*, "impose[] a broad and undifferentiated disability" on lesbian and gay people with a "sheer breadth * * * so discontinuous with the reasons offered" that they violate equal protection. 517 U.S. at 632.

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"As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579. A "prime part of the history of our Constitution * * * is the story of the extension of constitutional rights and protections to people once ignored or excluded." *VMI*, 518 U.S. at 557. Here, petitioners seek the "duties and responsibilities that are an essential part of married life," *Windsor*, 133 S. Ct. at 2695, that opposite-sex couples, and tens of thousands of same-sex couples, already enjoy. The laws they challenge exclude a long-mistreated class of human beings from a legal and social status of tremendous import. Those laws are not adequately justified by any of the advanced rationales. They are accordingly incompatible with the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2015